

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HAO-QI GONG, and JEFFERY PETERS, No. C 03-05495 TEH

Plaintiffs,

v.

**ORDER RE MOTIONS FOR
SUMMARY JUDGMENT**

CITY OF ALAMEDA, et al.,

Defendants.

This matter came before the Court on January 4, 2007 at 10:00 a.m. Having carefully considered the parties' written and oral arguments, and the record herein, and good cause appearing, the Court grants in part and denies in part Defendants' Motion for Summary Judgment and denies Plaintiffs' motion for summary judgment.

I. BACKGROUND

This action arises out of a child welfare inspection of Plaintiffs' son by the City of Alameda Police Department in 2003. Plaintiffs, Hao-Qi-Gong ("Gong") and Jeffrey Peters ("Peters") assert that their 4th and 14th Amendment rights were violated when Defendants (1) entered their apartment without a warrant, (2) subsequently arrested them, and (3) placed their son in temporary protective custody.¹ Plaintiffs seek damages

¹ As a threshold matter, Defendants contend that Peters' claims should be dismissed because while he was born Jeffrey Peters, he changed his name in the early 1990s to Jonathan Matrix Peters. When this issue was identified at Peters' deposition his counsel stated that he would bring a motion to amend the complaint to conform to Peter's legal name. Although Plaintiffs' counsel failed to do so until January 4, 2007,

1 pursuant to 42 U.S.C. § 1983 for these alleged deprivations. The two Defendants
2 remaining in the case – Sergeant Ronald Jones (“Jones”) and Sergeant Jon
3 Westmoreland (“Westmoreland”) – seek a summary judgment on all claims. Plaintiffs
4 also seek a summary judgment in their favor on all claims.

5 The key facts underlying this case are as follows and except as noted, are
6 undisputed.

7 In early 2003, the Alameda Police Department began receiving allegations that
8 Kyle Peters, age 7, was being neglected and/or abused by his parents, Peters and Gong.
9 The allegations were made by Kyles’ grandmother (Peters’ mother), Ms. Janet
10 Friedman-Edwards (“Edwards”), who lives in Southern California. Kyle had previously
11 stayed with her for about six months until January 2003 when Gong had retrieved him.
12 On February 4, 2003, Detective Jill Ottaviano (“Ottaviano”) went to Kyle’s apartment to
13 perform a welfare inspection. Gong answered the door and showed her Kyle but refused
14 to allow Ottaviano into the apartment. *See* Fox Dec., Ex. E .

15 In February and March 2003, Kyle’s grandmother continued to express concerns
16 to the Alameda Police Department about Kyle’s welfare in faxes and phone
17 conversations, including the following: (1) Gong was involved in the sex escort business,
18 (2) Kyle had told her that Gong had put her finger up his anus at least twice, (3) Kyle
19 had excessive absences from school, (4) Kyle had previously been under investigation
20 with the child protection agency in Santa Clara, California when Kyle’s four front teeth
21 were knocked out and he had been placed in a foster home for one month, (5) that Kyle’s
22 teeth had been neglected and that after an emergency visit to the dentist to extract an
23 abscessed tooth, Kyle still required a root canal and six fillings, and (6) that Kyles’
24 parents travel overseas for up to three weeks at a time in connection with their sex escort

25 _____
26 the Court concludes that this misnomer in the complaint does not warrant dismissal of
27 Peters’ claims. Federal Rule of Civil Procedure 17(a) contemplates that a court may
28 permit correction of a caption if the real party in interest has not been correctly
identified. Here, the misstatement of Plaintiffs’ first name did not prejudice
Defendants and was not pursuant to any effort to hide the true identity of Mr. Peters.
Accordingly, the Court will grant Plaintiffs’ application to correct the caption.

1 service and that they never call in to whomever is taking care of Kyle or provide any
2 way to contact them in case of emergency. *See* Fox Dec., Ex. A at 25, Ex. F. A copy of a
3 dental record supporting the second to last allegation was also provided. *Id.* Kyle's
4 grandmother also wrote to Kyle's school. *Id.* On March 5, 2003, Ms. Friedman- asked
5 whether any safety checks had been done on Kyle. *Id.*, Ex. F.

6 Detective Ottaviano sought the assistance of Sergeant Jones. During the week of
7 March 3, 2003, Jones checked on the internet but was unable to confirm that Gong was
8 involved in a sex escort business and so closed out that part of the investigation. *See*
9 Jones Dep. at 24. On Monday, March 10, 2003, Jones received a copy of Ms. Friedman-
10 Edwards' latest fax, dated Friday, March 7, 2003, in which she addressed some of her
11 concerns. Fox Dec., Ex. A at 95. Jones had an associate contact Kyle's school. If Kyle
12 had been in school, Jones testified, he would have gone to check on him there. Jones
13 Dep. at 95. After it was confirmed, however, that Kyle was not in school, Jones went to
14 Kyle's apartment in Alameda, along with Detectives Munoz and Jaime, to check on
15 Kyle's welfare. It was around 2:00 p.m. in the afternoon. Jones Dep. at 17-18; Ex. E at
16 5. The officers, who were all in plainclothes, knocked, announced their identity, and
17 waited. When there was no response, they went to the apartment manager, Mary Ellen
18 Juhnke ("Juhnke"), and returned with her to the apartment with a pass key. While there
19 is some conflict as to whether Juhnke and Jones both knocked and spoke at this point or
20 just Jones, it is undisputed that there was additional knocking and announcement at this
21 time but no answer. Juhnke and the officers then saw a shadowy presence passing over
22 the peep hole indicating that someone was inside. Peters also testified that he looked out
23 the peep hole and saw a person he assumes was Ms. Juhnke.

24 When there continued to be no response, Jones used the manager's key to open
25 the door. Jones again announced their presence and called for the person to come out.
26 The apartment was so filled with boxes, cartons, dirty clothing, and miscellaneous debris
27 that it was difficult to walk through the apartment. Juhnke Dep. at 48; Westmoreland
28 Dep. at 40-42. Fox Dec., Ex. E at 5. At this point, Jones called for a back-up officer in

1 uniform so that it would be clear that it was the police department entering and not a
2 burglar. *See* Jones Dep. at 37, 39. While waiting at the door for the back up officer to
3 arrive, Peters walked toward them from the apartment hallway talking to someone on the
4 cell phone, later identified as Gong. While there is a dispute as to the exact substance
5 and tenor of the exchange, it is undisputed that Jones told Peters that the purpose of the
6 visit was to check on Kyles' welfare based on concerns expressed by the grandmother.
7 It is also undisputed that Peters told Jones that Kyle was not in the apartment but was
8 with his mother who had gone to San Francisco to get a check for the rent. He did not
9 answer Jones' question as to why Kyle was with his mother on an errand instead of in
10 school. *Id.* at 45; Fox Decl., Ex. E at 6.

11 Peters resumed speaking to Gong on the cell phone and directed Gong to take
12 Kyle directly to the police station and meet them there so that the police could see that
13 Kyle was okay. Peters also told Jones that Kyle's grandmother was just making up false
14 and erroneous things. Fox Dec., Ex. C at 249; *see also* Juhnke Dep. at 47; Fox Dec., Ex.
15 E at 6. Jones asked Peters if he would also go and meet them at the station and Peters
16 agreed. Jones asked Peters to call Gong again and confirm that she was going directly to
17 the police station. Peters made a cell phone call but began speaking in an Asian
18 language. Jones told Peters to hang up because he could not understand the
19 conversation. Thereafter, it appeared to Jones that Peters had began stalling. Gong then
20 suddenly appeared in the hallway of the apartment building – without Kyle. This turn of
21 events took Jones by surprise because Peters had told him that Kyle was with Gong and
22 that they were enroute to the police department.

23 According to Jones, the following events then transpired. He asked Gong, who
24 had a "deer in the headlights" look, if Kyles was in the apartment but she didn't respond.
25 Jones Dep. at 59. Peters started to say something, Gong looked at him, and Jones told
26 her, "don't look at him. . . . Answer my questions." *Id.* at 60. Neither Gong nor Peters
27 responded. According to Jones, Gong then attempted to walk into the apartment a
28 second time although he had already told her to stay where she was. Jones jumped in

1 front of her and put his arm out across the hallway to block her entrance. He then asked
2 her again if Kyle was inside and she “finally said yes.” *Id.* Jones then arrested both
3 Gong and Peters for obstructing his welfare check of Kyle pursuant to California Penal
4 Code § 148 which makes it a crime to “wilfully resist[], delay[], or obstruct[] any. . .
5 peace officer . . . in the discharge or attempt to discharge any duty.”

6 Gong’s version is as follows. She testified that the cell phone kept cutting in and
7 out when she was talking earlier to Peters. She only recalls him telling her to meet him
8 at the police station. She doesn’t recall him asking if Kyle was with her or telling her to
9 take Kyle to the police station. *See* Gong Dep. at 220. She testified that she assumed
10 Kyle was in the apartment but she was too shocked at the situation to answer Jones’
11 questions when she encountered the officers at the front door of her apartment. She
12 states that she never moved her feet or attempted to walk toward the apartment doorway;
13 rather she just stood and leaned to the right in an effort to see Peters and make eye
14 contact with him. *Id.* at 226, 228. She testified that after a few quick questions Jones
15 arrested her for not cooperating. *Id.* at 228.

16 After Gong and Peters were taken into custody, Jones entered the apartment and
17 asked Kyle to come out. Kyle peeked out of a room and slowly came forward. Jones
18 called Sargent John Westmoreland (“Westmoreland”), a member of the police
19 department’s youth services to interview Kyle about the grandmother’s allegation that
20 Gong had digitally penetrated him. Westmoreland testified that when the conversation
21 turned to this topic Kyle confirmed that Gong had digitally penetrated him twice and that
22 it was to help him to go to the bathroom. Westmoreland believed, having talked to
23 hundreds of kids over the years in similar types of cases, that the answer was rehearsed.
24 He observed that when the conversation turned to this subject Kyle became withdrawn,
25 spoke in a whisper, and would no longer make eye contact. Following the interview,
26 Westmoreland placed Kyle in temporary protective custody primarily because Kyle’s
27 parents’ arrests left him without any adult supervision. He also had Gong charged with
28

1 additional violations of Penal Code sections 288(a) and 289(d)(4) relating to sexual
2 abuse. Westmoreland Dep. at 56-57.

3 4 II. SUMMARY JUDGMENT STANDARD

5 Summary judgment is appropriate when there is no genuine dispute as to material
6 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
7 56(c); *Toscano v. Prof'l Golfers Ass'n*, 258 F.3d 978, 982 (9th Cir. 2001). A dispute as
8 to a material fact is “genuine” if there is sufficient evidence for a reasonable jury to
9 return a verdict for the nonmoving party. *Id.* The court may not weigh the evidence and
10 must view the evidence in the light most favorable to the nonmoving party. *Id.* at 255.

11 A party seeking summary judgment bears the initial burden of informing the court
12 of the basis for its motion, and of identifying those portions of the pleadings and
13 discovery responses that demonstrate the absence of a genuine issue of material fact.
14 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have
15 the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of
16 fact could find other than for the moving party. *Id.* at 322-323. However, on an issue
17 for which its opponent will have the burden of proof at trial, the moving party can
18 prevail merely by “pointing out to the District Court . . . that there is an absence of
19 evidence to support the nonmoving party’s case.” *Id.* at 325. If the moving party meets
20 its initial burden, the opposing party must then “set forth specific facts showing that
21 there is a genuine issue for trial” in order to defeat the motion. Fed. R. Civ. P. 56(e);
22 *Anderson*, 477 U.S. at 250.

23 24 III. PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

25 Pursuant to this Court’s Order for Pretrial Preparation, the parties’ motions for
26 summary judgment were due on November 13, 2006. The Court continued this deadline
27 to November 20, 2006 in order to accommodate the schedule of counsel for defendants.
28 On December 5, 2006, Plaintiffs filed a single document purporting to be both an

1 opposition to Defendants' Motion for Summary Judgment and a "Motion for Summary
2 Judgment."

3 As this purported "motion" is over two weeks late, it is denied as untimely. The
4 Court also notes that Plaintiffs' opposition was due December 4, 2006, and thus was one
5 day late. The Court will consider it, however, given that (1) Defendants have not
6 identified any prejudice that resulted from the tardiness of the filing, and (2) the Court's
7 preference to decide matters on the merits. Plaintiffs are forewarned, however, that any
8 additional late filings will likely result in the imposition of sanctions.

9 10 IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

11 A. FOURTH AMENDMENT CLAIM FOR ENTRY WITHOUT A WARRANT

12 Plaintiffs contend that Defendants' entry into the apartment without a search
13 warrant violated their fourth amendment rights. Defendants contend that the entry was
14 authorized by the "emergency aid" exception to the warrant requirement, and that even if
15 it was not, Defendants are protected against a suit for damages by qualified immunity.

16 Under the "emergency aid" exception, police officers are permitted warrantless
17 entry into a home as part of their "community caretaking function." *Martin v. City of*
18 *Oceanside*, 360 F.3d 1078, 1082 (9th Cir. 2004). Under this "emergency aid" exception,
19 police officers may make warrantless entries when they "reasonably believe that a person
20 within is in need of immediate aid." *Id.* (quoting *Mincey v. Arizona*, 437 U.S. 385, 392
21 (1978)). Specifically, this exception applies if (1) the police have reasonable grounds to
22 believe that there is an emergency at hand and an immediate need for their assistance for
23 the protection of life or property, and (2) there must be some reasonable basis
24 approximating probable cause to associate the emergency with the area or place to be
25 searched. *Id.* at 1081-82.²

26
27 ² The Ninth Circuit emergency aid exception also included a third element,
28 "that the search must not be primarily motivated by intent to arrest and seize
evidence." In the recent case of *Brigham City, Utah v. Stuart*, ___ U.S. ___, 126 S.Ct.
1943 (2006), however, the Supreme Court disapproved of injecting a subjective

1 With respect to Defendant's claim for qualified immunity, courts first consider
2 whether, taken in the light most favorable to the party asserting the injury, the facts show
3 a violation of a constitutional right – which in this case would be a violation of the
4 Fourth Amendment. Second, the Court asks whether the officer could nevertheless
5 have “reasonably but mistakenly believed that his or her conduct did not violate a clearly
6 established constitutional right.” *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th
7 Cir. 2001). This is “an objective standard” that leaves ““ample room for mistaken
8 judgments.”” *Duran*, 904 F.2d at 1376. Indeed the standard protects ““all but the plainly
9 incompetent or those who knowingly violate the law.”” *Franklin v. Fox*, 312 F.3d 423,
10 437 (9th Cir. 2002) (citations omitted).

11 In this case, the Court concludes, for the reasons explained below, that the
12 undisputed facts indicate that the emergency aid exception is applicable here. Further,
13 even if it were not, the Court concludes that Jones could have reasonably but mistakenly
14 believed that the exception was applicable.

15 Plaintiffs do not question that the emergency aid exception can be invoked in the
16 context of a child welfare check. Nor do Plaintiffs dispute that Jones had grounds to go
17 to Kyle's apartment to conduct a safety welfare check on Kyle on March 10, 2006. At
18 the same time, Defendants concede that there was no emergency at the time Jones went
19 to the apartment to check on Kyle. Rather, both parties agree that the key question is
20 “whether Jones reasonably believed there was an emergency based on the grandmother's
21 information, Kyle's absence from school that day, *and the refusal of someone inside the*
22 *apartment to answer the door.*” See Pls.' Opp. at 6; Defs.' Reply at 2 (emphasis added).

23 This Court agrees with Defendants that once they were at the apartment door and
24 it was clear that someone was inside – but refusing to answer the door – the situation
25 changed. At this point, Jones could reasonably conclude that Kyle was either alone

26 _____
27 element into the test. Rather, the focus should be on whether the action is objectively
28 reasonable under the Fourth Amendment, “regardless of the individual officer's state
of mind.” *Id.* at 1948. In any event, Plaintiffs do not assert that Jones was motivated
by any improper motive in this case.

1 inside (since he was not at school) or that there was an adult inside with Kyle who was
2 refusing to answer the door despite knowing it was the police repeatedly knocking.
3 Under these circumstances, and given the allegations of abuse and neglect, Jones could
4 reasonably conclude that Kyle could be in an unsafe situation and in need of immediate
5 aid. As such, the emergency aid exception protects Jones' use of the pass key to open
6 the door and ascertain Kyle's welfare.

7 Even if the exception is not applicable, Jones could have reasonably believed that
8 his actions did not violate clearly established law. In *Martin v. City of Oceanside*, 205
9 F. Supp.2d 1142 (S.D.Cal. 2002), a father who had been unable to reach his adult
10 daughter told the police that he was urgently concerned for her welfare. *Id.* at 1150. The
11 police went to house where she was living as a roommate but no one answered the door
12 despite repeated knocking. A call to her phone number was also not answered. The
13 police had reason to believe she was in the house because her car was in the drive way.

14 The district court, ruling in 2002, concluded that under these circumstances the
15 emergency aid exception justified the officers' entry in the house to check on the
16 daughter's welfare. In affirming, the Ninth Circuit emphasized that police have "a duty
17 under the community caretaking function to investigate a potential emergency situation":

18
19 The officers' reasonable conclusion that a potential emergency situation
20 could be located inside Martin's home was sufficiently supported by a
21 father's concern about his daughter, the neighbor's indication that the
22 daughter should be in the residence, the presence of her car in the
23 driveway, and the unexplained failure to respond to their knock on the
24 door.

25 *Martin*, 360 F.3d at 1082. As in *Martin*, Jones similarly believed that he faced a
26 potential emergency situation based on the grandmother's allegations regarding the
27 neglect and abuse of her grandson, Kyle's absence at school, and the unexplained failure
28 of someone inside to respond to the repeated knocking on the door by the police. Thus,
even if Jones did not in fact have grounds for a warrantless entry under the emergency

1 aid exception, he could have mistakenly but reasonably believed that his entry did not
2 violate clearly established constitutional law in light of *Martin*.

3 Plaintiffs argue that Jones should have discounted the grandmother's "campaign"
4 to have Plaintiffs investigated as a custody struggle between the grandmother and the
5 Plaintiffs, particularly given the grandmother's reference in one fax to "grandparent
6 rights." The grandmother's letters and faxes, however, were also entirely consistent with
7 those of a close relative who has a legitimate and genuine concern for the child. *See* Fox
8 Dec., Ex. F. As such it was not unreasonable for Jones to treat the grandmother's
9 concerns seriously.

10 Given all of the above, the Court finds that Defendants are entitled to a summary
11 judgment on Plaintiffs' fourth amendment claim based on Defendants' warrantless entry.

12 13 14 B. FOURTH AMENDMENT CLAIM FOR UNLAWFUL ARREST

15 1. Jeffrey Peters

16 Peters contends that Defendants lacked probable cause to arrest him for a
17 violation of California Penal Code § 148 which makes it a crime to "wilfully resist[,
18 delay[, or obstruct[] any. . . peace officer . . . in the discharge or attempt to discharge
19 any duty." Probable cause to arrest exists when the "facts and circumstances within the
20 officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable
21 caution, in believing, in the circumstances shown, that the suspect has committed, is
22 committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37
23 (1979). The evidence need support "only the probability, and not a prima facie
24 showing, of criminal activity." *Franklin*, 312 F.3d at 438 (citation omitted). Once a
25 defendant has provided "some evidence" of probable cause, it is the plaintiff's burden to
26 prove a lack of probable cause. *Dubner v. City and County of San Francisco*, 266 F.3d
27 959, 965 (9th Cir. 2001).

1 Here, Jones was reasonable in believing, based on all of the circumstances known
2 to him, that Peters was attempting to interfere with or delay his duty of conducting a
3 welfare check of Kyle. First, Peters told Jones that Kyle was not in the apartment when
4 in fact he was in the apartment. Second, he told Jones that Gong was going to the police
5 station with Kyle to meet Jones when in fact she was not. Third, by calling Gong back
6 in a foreign language it appeared that Peters might be trying to end-run the welfare
7 check. Fourth, Peters then acted as if he were stalling his departure from the apartment.
8 Fifth, once Gong arrived, Peters and Gong continued to delay in identifying Kyle's
9 location.

10 Plaintiffs argue that section 148 does not specifically criminalize lying to the
11 police whereas other statutes do (*see e.g.* Calif. Penal Code § 148.9 which makes it a
12 crime to give a false name at time of booking). The fact that other statutes make a
13 specific lie a criminal act, however, does not necessarily imply that the police are
14 prohibited from considering lies (or statements that reasonably appear to be lies) in
15 determining whether someone is attempting to interfere with or delay the discharge of a
16 duty under § 148. Further, the misstatements here accompanied the physical act of
17 refusing to produce Kyle for the welfare check although he was in the apartment the
18 entire time.

19 In sum, given all of the above, Jones had probable cause to arrest Peters for
20 attempting to interfere with or delay the welfare check of Kyle in violation of § 148.
21 Even if he did not, a "reasonable officer could have believed that probable cause existed
22 to arrest." *Franklin*, 312 F.3d at 437. As such, Jones has qualified immunity with respect
23 to this claim. *Id.* Accordingly, Defendants are entitled to a summary judgment with
24 respect to Peters' claim for false arrest.

25 26 2. Gong

27 While a reasonable officer clearly had grounds to believe that Peters was engaged
28 in an effort to interfere with or delay the welfare check of Kyle, there is less direct

1 evidence of such affirmative efforts by Gong, particularly given the timing of her return
2 to the apartment with a “deer in the headlights” look. Further, there is a significant
3 factual dispute. Jones emphasized that he arrested Gong because she disobeyed his order
4 not to go into the apartment. *See* Jones Dep. at 61. While disobedience of a direct order
5 would be a relevant consideration, Gong flatly denies that she disobeyed this order. If
6 this factual dispute is resolved in Plaintiffs’ favor, and other inferences are drawn in her
7 favor, there is insufficient evidence to establish qualified immunity. Accordingly, the
8 Court concludes that Defendants’ motion for summary judgment and qualified immunity
9 on this claim should be denied with respect to Gong’s arrest under section 148. *Prison*
10 *Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005)(summary judgment should be
11 denied where factual dispute precludes determination of qualified immunity).

12 Plaintiffs also contend that there was no probable cause for the sex offenses added
13 later by Sergeant Westmoreland. Plaintiffs argues, for the first time at oral argument,
14 that regardless of the validity of Plaintiffs’ initial arrest, that the lack of probable cause
15 on the sex offense charges creates a separate fourth amendment claim because these later
16 added charges lengthened her detention. Even assuming *arguendo* that Plaintiffs are
17 correct, *see Merkle v. Upper Dublin School Distr.*, 211 F.3d 782, 790 n. 7 (3rd. Cir.
18 2000), this claim fails because the Court concludes that there was probable cause to
19 support the sex offense charges in light of: (1) the grandmother’s allegations, (2) the
20 confirmation of the digital penetration by Kyle, and (3) Westmoreland’s assessment of
21 Kyle’s verbal and non-verbal responses during his interview with Kyle.

22 Plaintiffs argue that Westmoreland had no specific evidence that Gong possessed
23 an “intent to arouse.” They offer no authority, however, that an officer must have
24 specific evidence of such intent at the time the charges are made. Further, even if
25 Westmoreland lacked probable cause to add the charges, the Court finds that he is
26 protected by qualified immunity because a “reasonable officer could have believed that
27 probable cause existed to arrest” given all of the circumstances. *Franklin*, 312 F.3d at
28 437.

1
2 C. FOURTEENTH AMENDMENT RIGHT FOR PLACEMENT OF KYLE IN
3 TEMPORARY CUSTODY

4 Finally, Plaintiffs claim that Defendants violated their rights to “family
5 association” under the fourteenth amendment when Kyle was placed in temporary
6 protective custody after Peters and Gong were arrested and taken into custody. Plaintiffs
7 concede that when parents are not longer present (because they are taken into custody)
8 that the state has the authority to place a young child such as Kyle in protective custody.
9 *See* Pls.’ Opp. At 15. Plaintiffs, argue, however, that because their fourth amendment
10 rights were violated when they were arrested, that Defendants should not be able to rely
11 on this authority. In short, they essentially argue that they have a derivative fourteenth
12 amendment claim based on the alleged fourth amendment violation.

13 Plaintiffs cite no authority that provides for such a derivative claim. Rather, it
14 appears that the “loss of familial association” that Plaintiffs complain of is more
15 appropriately viewed as an element of damages arising from the alleged false arrests
16 since, as Plaintiffs assert, it is the false arrests that caused the familial separation.
17 Accordingly, the Court shall dismiss Plaintiffs’ fourteenth amendment claim for failure
18 to state a claim for relief. In the event, however, that Plaintiff Gong were to prevail on
19 her false arrest claim, she could seek to recover, as part of her damages for that claim,
20 the damages she sought in her fourteenth amendment claim.

21
22 V. CONCLUSION

23 Accordingly, and good cause appearing it is HEREBY ORDERED that:

- 24 1. Plaintiffs’ Motion for Summary Judgment is denied as untimely.
25 2. Defendants’ Motion for Summary Judgment is granted with respect to all
26 claims and all parties, except with respect to Plaintiff Gong’s claim for false arrest
27 against Defendant Jones.
28

1 3. The parties are referred to Magistrate Judge Elizabeth LaPorte for a mandatory
2 settlement conference.. All remaining pretrial and trial dates are vacated to provide the
3 parties a final opportunity to settle this matter.

4 4. In the event no settlement is reached the parties shall appear on February 12,
5 2007 at 1:30 p.m. to reset the remaining pretrial and trial dates.

6
7
8 **IT IS SO ORDERED.**

9
10 Dated: January 17, 2007



THELTON E. HENDERSON
UNITED STATES DISTRICT
JUDGE